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In The

Supreme Court of the United States

October Term, 1998

MICHAEL L. PIASKOWSKI,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

CERTIORARI TO REVIEW A DECISION OF THE
WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION

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ARGUMENT

I. THE CREDIBLE EVIDENCE WAS SUFFICIENT TO CONVICT THE PETITIONER OF FIRST-DEGREE INTENTIONAL HOMICIDE.

The petitioner, Michael L. Piaskowski, asks this Court to decide whether his right to due process was violated when the Wisconsin Court of Appeals sustained his conviction of first-degree intentional homicide on the basis of

evidence which the trial court considered too incredible to support the conviction,

This question is not presented under the facts of this case because the trial court never made any such finding.

The joint trial of all six defendants in this case was to a jury, not the court.

In deciding the postconviction motion of codefendant Dale Basten,[1] the trial court found that "[a]t the conclusion of the State's case, there was more than adequate credible evidence which would have allowed the jury to find all defendants guilty." Decision and Order, Case No. 95-CF-00242, at 13-14, Respondent's Appendix at 8.

The trial court further determined that a new trial was not warranted by the partial recantation of prosecution witness Brian Kellner's trial testimony recounting statements of codefendant Keith Kutska about the events which led to the murder of Thomas Monfils.

In the context of the discussion of this issue, the court noted that Kellner committed perjury either at the trial when he gave his testimony or at the postconviction hearing when he recanted part of that testimony. *Id.* at 3, Appendix at 3. The court opined that Kellner's trial testimony was "barely credible," but credible nevertheless. *Id.* Obversely, the court had difficulty accepting Kellner's recantation as credible, and doubted that a jury would believe it. *Id.* at 4-5, Appendix at 5.

Thus, the trial court, while not giving the veracity of Kellner's trial testimony a solid endorsement, indicated that it was sufficiently credible for the jury to believe and rely on in reaching their verdicts.

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[1]Basten was the first of the six defendants to file a postconviction motion. In deciding Piaskowski's separate postconviction motion, the court for the most part incorporated rulings it had made in the earlier motions of other defendants. Decision and Order, Case No. 95-CF-00239, at 7, Respondent's Appendix at 12.

But even if the trial court had found Kellner's trial testimony incredible, any such finding would be irrelevant on appellate review of the sufficiency of the evidence.

Under standards established by this Court, review to confirm whether the evidence was sufficient to support a criminal conviction involves an assessment of whether the evidence could support any reasonable determination of guilt beyond a reasonable doubt. *See United States v. Powell*, 469 U.S. 57, 67 (1984).

The question is not whether the reviewing court believes the defendant is guilty, but whether any rational trier of fact could have made that finding under the state law defining the offense on the evidence viewed in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979). All the favorable evidence, even any which has been admitted erroneously, must be considered. *See Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988).

It is the responsibility of the trier of fact to resolve conflicts in the evidence, weigh the evidence, and draw reasonable inferences from it. *See Jackson v. Virginia*, 443 U.S. at 319.

Thus, a court faced with a record of historical facts which support conflicting inferences must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. *See id.* at 326.

If there is a plausible account of the evidence which supports the conclusion of the trier of fact, a reviewing court may not reverse even though as factfinder it would have weighed the evidence differently and come to a different conclusion. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

More important here, an assessment of the credibility of the witnesses is generally beyond the scope of the review. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995). Even the trial court, which has heard the testimony itself, is not to assess the credibility of the witnesses or weigh the evidence in reviewing the sufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 16 (1978).

The credibility of testimony may be second-guessed only in the very rarest of circumstances, *see Durrett v. CIR*, 71 F.3d 515, 517 (5th Cir. 1996), where it is contradicted by indisputable documentary or physical evidence, or is so inherently inconsistent or implausible on its face that no reasonable factfinder could believe it. *See Anderson v. City of Bessemer City*, 470 U.S. at 575. *See also Mitchell v. United States*, 141 F.3d 8, 17 (1st Cir. 1998); *Guerra v. Johnson*, 90 F.3d 1075, 1079 (5th Cir. 1996); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993).[2]

Piaskowski does not appear to assert that the trial court ruled Kellner's testimony was incredible as a matter of law. He asserts only that the court "considered" the testimony "too incredible" to support his conviction, Petition for Certiorari, Questions Presented, suggesting that the judge made his own subjective assessment of Kellner's credibility, and found it insufficient to convince him.

But applying the rules discussed above, if a trial court improperly substitutes its own view of the credibility of testimony which the jury could have lawfully found credible, an appellate court, in reviewing the sufficiency of the evidence de novo, may simply ignore the finding which the trial court had no right to make.

Moreover, even if a trial court concludes in its review of the jury's verdict that evidence is incredible as a matter of law, that ruling, like any other legal conclusion of a lower court, is subject to reversal if the appellate court determines that it is erroneous.

So even if Piaskowski had asserted that the trial court ruled Kellner's testimony was incredible as a matter of law, he would still not have shown any constitutional defect in his

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[2]Wisconsin employs the same standards on appellate review of the sufficiency of the evidence. *See State v. Piaskowski*, No. 97-2104-CR, slip op. at 2-3, Petitioner's Appendix at 2-3 (Wis. Ct. App. Sept. 22, 1998) (citing *State v. Poellinger*, 153 Wis. 2d 493, 506-08, 451 N.W.2d 752, 757-58 (1990)).

conviction for he makes no argument that the state appellate court could not have properly reversed any such ruling.

With Kellner's testimony thus subject to the usual rule that credibility is no concern of either a trial or appellate court reviewing the sufficiency of the evidence, the court of appeals properly concluded that the evidence of record was sufficient to convict Piaskowski of first-degree intentional homicide as a party to the crime.

No single witness provided evidence which proved by itself that Piaskowski was involved in a conspiracy to kill Thomas Monfils. But sifting and winnowing the testimony of the various witnesses who testified in this twenty-nine day trial, drawing reasonable inferences from the testimony they believed, and putting it all together, the jury could have reasonably found that the police received an anonymous call reporting that Keith Kutska, an employee at the James River paper mill in Green Bay, was going to steal an expensive electrical cord at the end of his work shift. Transcript (9/28/95) at 23-26.[3]

A security guard at the mill tried to stop Kutska when he left work, but Kutska bolted out the door without letting the guard inspect his bag. *Id.* at 32-33. Because of his evasion, he was suspended for five days. Transcript (10/12/95) at 217-18.

Kutska was upset about the suspension and decided to find out who snitched on him. Transcript (10/16/95) at 239-41; (10/17/95 PM) at 63-65.

Despite the fact that Kutska had stolen the cord, Transcript (10/12/95) at 214-15, he asked the police for a recording of the anonymous call so he could "clear his name." Transcript (9/28/95) at 40, 43. And despite the fact that the informant called again and pleaded with the police not to release the recording because he feared his voice would be

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[3]The respondent has included citations to the record to show that every statement of fact can be documented. Because the transcripts are voluminous, however, the respondent hesitates to send them unless the Court deems them necessary to decide this petition. The respondent will of course promptly provide any and all transcripts needed by the Court.

recognized, the police gave Kutska a copy of the tape. Transcript (9/28/95) at 43, 46, 49-50, 54; (10/16/95) at 241-42.

Kutska immediately recognized the voice on the recording as that of Thomas Monfils. Transcript (10/16/95) at 243.

Shortly after seven the next morning, Kutska confronted Monfils with the tape in the control room or "coop" of the number seven paper machine at the James River mill. Transcript (10/12/95) at 259-62.[4] Monfils admitted it was his voice on the recording. *Id.* at 262-63.

Kutska then played the tape in the coop of the neighboring number nine machine for a group which included Dale Basten, Michael Hirn, Michael Johnson, Reynold Moore, and Michael Piaskowski. Transcript (10/4/95) at 239-40; (10/5/95) at 3-6.

Kutska implied that he did not take the cord, and was falsely accused by Monfils. Transcript (10/17/95 AM) at 46-47. He told Moore and Hirn, a good instigator, that they should give Monfils some "shit" for snitching on a fellow union brother. Transcript (10/5/95) at 8; (10/16/95) at 262; (10/17/95 PM) at 83-84. *See* Transcript (9/28/95) at 142; (10/6/95) at 300.

The men in the number nine coop became ever angrier as each of them fed off the comments made by another. Transcript (10/2/95) at 31, 115; (10/3/95) at 84-85; (10/18/95) at 33-34; (10/19/95 AM) at 118; (10/19/95 PM) at 66. Finally they decided to let Monfils know how they felt about Kutska's suspension. Transcript (10/5/95) at 7, 75-76.

Monfils left the number seven coop to perform a periodic operation known as a "turnover." Transcript (9/28/95) at 147-49. When he finished about 7:35 a.m., he was surrounded and confronted near the bubbler across from the paper machines by the entire group from the neighboring control room. Transcript (9/29/95) at 82; (10/5/95) at 7-8, 63,

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[4]A floor plan of the areas of the paper mill where the events in this case took place is included in the Appendix at 13.

102, 218; (10/12/95) at 276; (10/13/95) at 169-70; (10/14/95) at 38-39; (10/17/95 AM) at 60.

They started hollering and swearing at Monfils. Transcript (10/5/95) at 9, 77. Him shoved him. Transcript (10/5/95) at 12; (10/13/95) at 130-32. Kutska punched him in the face. Transcript (10/13/95) at 170. Moore hit him on the back of the head. Transcript (10/5/95) at 10; (10/13/95) at 131-32, 170-71. Then everyone joined in kicking and beating him. Transcript (10/13/95) at 169-70, 182.

Monfils suffered numerous injuries to his head, neck, chest and abdomen, including a depressed fracture on the back of his skull. Transcript (10/4/95) at 185-98, 204, 208. At the end of the attack, he was unconscious but alive, lying there curled up in a ball. Transcript (10/4/95) at 222; (10/13/95) at 183.

About 7:40 a.m., David Wiener observed Basten and Johnson in an area which connects the paper machines with the vat or "dump chest" which supplies paper pulp to the machines. Transcript (9/29/95) at 225; (10/4/95) at 60; (10/6/95) at 128; (10/9/95) at 94-97. Johnson was walking backwards, about five or six feet ahead of Basten. Transcript (10/9/95) at 98. Both were bent over, and appeared to be carrying something, although Wiener could not see what it was. *Id.* at 98-99. They were heading south, toward the vat. Transcript (10/4/95) at 60; (10/9/95) at 100.

About 7:45 a.m., Kutska, Piaskowski and Moore entered the number seven coop. Transcript (9/28/95) at 156-57; (9/29/95) at 21; (10/11/95) at 92-93.

Kutska told Piaskowski to notify a supervisor that Monfils was missing. Transcript (9/28/95) at 159. Piaskowski told the supervisor that "[s]ome heavy shit [wa]s coming down." Transcript (10/3/95) at 207-09, 216; (10/11/95) at 99-101. A search for Monfils began. Transcript (10/2/95) at 228; (10/3/95) at 221-29.

Monfils's body was found when the pulp vat was drained. Transcript (10/4/95) at 16, 157. A weight which had been kept near the number seven machine was tied around his

neck with a rope from the same location. Transcript (9/29/95) at 4-7; (10/4/95) at 159-60, 172-73.

Monfils was unconscious but alive when he was thrown into the vat. Transcript (10/4/95) at 177-78, 222. He died by asphyxiation due to aspiration of paper pulp and ligature strangulation. *Id.* at 177-78, 200.

After the body was found, Basten kept coming to Wiener's work area to determine what could be seen from the table where Wiener had been sitting, and to find out what Wiener knew. Transcript (10/9/95) at 112-14, 207, 228-33; (10/10/95 AM) at 60-61. He suggested that Monfils could have suffered a specific injury which had not been made public. Transcript (10/10/95 PM) at 26-28.

When Basten was questioned by the police, he started to cry, and said he did not mean to kill Monfils. Transcript (10/13/95) at 240.

After his arrest, he called Wiener a "fuckin' squealer," Transcript (10/13/95) at 127-28, and said he should have left town when the police started questioning him because now they knew for a fact that "we did the shit." *Id.* at 124.

Because all six men who participated in the beating were subject to dismissal from their jobs, *see* Transcript (10/10/95 PM) at 17, not to mention prosecution for a serious felony, *see* Wis. Stats. §§ 940.19, 940.23 (1997-98), they all had a strong motive for disposing of the evidence of their rage, i.e., the person who could tell his employer and the police about the beating, and whose severely beaten body provided incontrovertible physical evidence of that fact.

Because two of those men, Basten and Johnson, were carrying something about the length of a body from the area where Monfils was beaten toward the vat where his body was found, in the brief interval between the time he was beaten and the time he was reported missing, the jury could reasonably infer that they were carrying the injured and unconscious Monfils to the vat.

Because Basten and Johnson carried Monfils to the vat, and because Basten by word and deed virtually admitted his responsibility for Monfils's death, the jury could reasonably

infer that they were the ones who threw him in. Since Monfils was unconscious with a heavy weight roped around his neck, the jury could reasonably conclude that Basten and Johnson intended to kill him when they threw him into the mucky pulp.

Although Piaskowski did not directly kill Monfils, he was equally liable for the homicide as a party to the crime.[5]

The jury could have reasonably inferred that Piaskowski was a party to a conspiracy to severely beat Monfils.

Under substantive Wisconsin law,

> "A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty actionable combination. . . . Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators . . . or their, even, all knowing . . . the precise thing to be accomplished or plans for its accomplishment . . . being distinctly stated by any member of the combine to any other member."

O'Neil v. State, 237 Wis. 391, 404-05, 296 N.W. 96, 102 (1941).

Since all six men incited by Kutska participated in the confrontation and beating of Monfils, it could reasonably be inferred that all six agreed with each other that he should be beaten because he was a snitch.

A conspiracy continues while the conspirators take active measures to prevent discovery of the crime or those connected with its commission. *See Gelosi v. State*, 215 Wis.

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[5]The case was submitted to the jury on both the conspiracy and aiding-and-abetting theories of party-to-a-crime liability. Transcript (10/26/95) at 10-12. The prosecutor argued that Piaskowski was guilty under both theories. *Id.* at 140. Under state law, these are simply different manners of participating in the same offense about which the jury does not have to unanimously agree. *See State v. Zelenka, 130 Wis. 2d 34, 47, 387 N.W.2d 55, 61 (1986).*

649, 655-56, 255 N.W. 893, 895-96 (1934). So when a crime is committed under circumstances where a body must be disposed of to avoid detection, the conspiracy persists until the disposition is accomplished. *See id.*

Here, the jury could have reasonably found that the conspiracy among those who confronted and beat Monfils persisted until he was disposed of to avoid detection. All six contributed to the mass of injuries which provided the same motive for all of them to erase the evidence of their mutual misdeeds. They all had a powerful reason to continue to act together, therefore, after the beating was completed.

It can reasonably be inferred that Kutska, Piaskowski and Moore, who were there when Monfils was beaten and were still together afterwards, knew what happened to Monfils. They returned to the number seven coop a few minutes after Monfils was dragged to the vat, suggesting they remained at the scene of the beating while Monfils was removed. When they returned, Piaskowski told a supervisor at Kutska's direction that Monfils was missing and some "heavy shit" was coming down. They could not have known so soon that Monfils was missing because of some "heavy shit" unless they knew he was dumped in the vat.

Yet knowing that Monfils was thrown into a pulp vat where he would surely die, neither Kutska, Piaskowski nor Moore made any effort to prevent his death by alerting anyone to the nature of his fate. Their collective silence under these circumstances suggests they all agreed that Monfils should be killed.

Under these circumstances, it could reasonably be inferred that all the original conspirators, including Piaskowski, agreed at least tacitly after the beating to dispose of both the physical evidence of the beating and the witness who could cost the persons who beat him their jobs and their freedom by throwing Monfils into the pulp vat where he would die and his body would soon decompose into inconspicuous paper pulp.

One who tacitly consents to the object of a conspiracy is guilty even though he intends to take no active part in the crime, but stands by while others put the common plan into

effect. *See O'Neil v. State*, 237 Wis. at 405, 296 N.W. at 102. Each conspirator is criminally responsible for the acts of any associates, which become the acts of all. *See State v. Bachmeyer*, 247 Wis. 294, 299, 19 N.W.2d 261, 263 (1945); *Pollack v. State*, 215 Wis. 200, 212, 214, 253 N.W. 560, 565, 254 N.W. 471 (1934).

And although Piaskowski's culpability may not have been as great as some other members of the conspiracy, he is still guilty of first-degree intentional homicide since each conspirator is guilty of the same offense as the direct perpetrator of the crime. *See id.*; Wis. Stat. § 939.05(2)(c) (1997-98).

The evidence adduced at the trial was sufficient to permit the jury to find that Basten intentionally killed Monfils by throwing him into a pulp vat with a weight around his neck to conceal the severe beating he had suffered at the hands of Basten and his companions, and that Basten's companion Piaskowski was a party to this crime.

II. THE ADMISSION OF THE EXTRAJUDICIAL STATEMENTS OF A CODEFENDANT AT THE PETITIONER'S TRIAL DOES NOT PRESENT AN ISSUE MERITING REVIEW BY THE SUPREME COURT.

A. The Petitioner Lacks Standing To Complain That His Right To Confrontation Was Denied.

The party invoking the jurisdiction of a federal court has the burden to establish that the court has jurisdiction. *See Steel Co. v. Citizens For A Better Environment,* 118 S. Ct. 1003, 1016-17 (1998). This Court has always insisted on strict compliance with this requirement. *See Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997).

To establish jurisdiction, the party must show that he has standing to sue. *See id.* And to show standing, he must clearly and specifically set forth facts sufficient to show that he has personally suffered an injury, fairly traceable to the opponent's unlawful conduct, and likely to be redressed by the requested relief. *See id.*; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The alleged injury must be both qualitatively and temporally concrete. *See Whitmore v. Arkansas*, 495 U.S. at 155. The injury must be palpable rather than abstract. *See id.* And the harm must be actual rather than hypothetical. *See id.*

Futhermore, the alleged injury must be legally and judicially cognizable, so it must be caused by an invasion of a legally protected interest. *See Raines v. Byrd*, 117 S. Ct. at 2317.

The Confrontation Clause is violated when hearsay is admitted as substantive evidence with no opportunity to cross-examine the declarant at the trial. *See Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). Obversely, this provision is not violated by the admission of an out-of-court statement as long as the declarant testifies as a witness and is subject to cross-examination. *See id.* at 737-38.

Piaskowski has no standing to argue in a federal court that his right to confrontation was denied when the extrajudicial statements of codefendant Keith Kutska were admitted at their joint trial because Piaskowski confronted and cross-examined Kutska.

Kutska testified at the trial. Transcript (10/16/95) at 232 et seq. Kutska addressed the subject matter of his prior statements in his testimony. *Id.* at 263-70. And Piaskowski cross-examined Kutska about the statements attributed to him. Transcript (10/17/95 AM) at 44-45.

Thus, Piaskowski suffered no actual, palpable injury to his right to confrontation as the result of the admission of Kutska's extrajudicial statements.

Piaskowski argues that he was prejudiced because he would have obtained a directed verdict of acquittal at the close of the state's case if Kutska's statements had been

barred under the Confrontation Clause during the state's case. But this contention confuses hearsay and confrontation objections to the admission of evidence.

If evidence is inherently inadmissible under a rule prohibiting hearsay, the rule is violated as soon as the evidence is erroneously introduced.

But as noted above, there are two necessary aspects to a confrontation violation, admission of hearsay and absence of cross-examination of the declarant. *See Kentucky v. Stincer*, 482 U.S. at 737-38. Thus, there can be no violation of the right to confrontation unless and until the party against whom an extrajudicial statement is admitted has been denied any opportunity to confront and cross-examine the declarant. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986). This could occur if the declarant is subsequently called to the stand and refuses to testify, *see id.*, or if he is not available to be called during any portion of the trial.

As long as the declarant testifies and is available for cross-examination, however, there is nothing in the Confrontation Clause which distinguishes between confrontation of the declarant during the state's case or confrontation during the presentation of the defense evidence. The critical consideration is that the party against whom a statement is introduced has a full and fair opportunity to probe testimonial infirmities such as forgetfulness, confusion or evasion through cross-examination of the person who supposedly spoke those words, under oath, before the jury which can observe the demeanor of the speaker, at some point during the trial itself. *See Maryland v. Craig*, 497 U.S. 836, 845-47 (1990); *Kentucky v. Stincer*, 482 U.S. at 737-38.

Piaskowski also appears to argue that his confrontation of Kutska somehow does not count because Kutska was forced to take the stand due to the admission of his prior statements. But it is hard to see how this fact, even if true, could endow Piaskowski with standing to claim that his right to confrontation was violated.

In *Harrison v. United States*, 392 U.S. 219, 222-23 (1968), this Court held that the government could not use against a defendant testimony he had given at a previous trial, when he testified at that trial only because his illegally procured confessions had been introduced first, thereby tainting his testimony as the fruit of a poisonous tree.

Harrison does not apply, however, when there is a claim that a defendant decided to testify because of the erroneous admission of hearsay evidence since neither the exclusionary rule nor its corollary fruits doctrine apply to alleged procedural error in the admission of evidence as distinguished from constitutional error in the procurement of evidence. *See Patton v. United States*, 688 A.2d 408, 411-12 (D.C.), *cert. denied*, 117 S. Ct. 1717 (1997) (citing *United States v. Bohle*, 475 F.2d 872, 875-76 (2d Cir. 1973), and other cases).

Besides, even if Kutska's rights had been violated by forcing him to testify in response to the admission of his extrajudicial statements, it would not help Piaskowski since, to establish standing, a defendant must show a violation of his own rights, not those of some third party. *See Raines v. Byrd*, 117 S. Ct. at 2317; *Whitmore v. Arkansas, 495 U.S. at 155.*

In any event, the record shows that Kutska did not decide to testify only because his prior statements had been introduced by the prosecution, but was planning to take the stand all along.

The introduction of Kutska's statements at the criminal trial could not have provided compulsion for him to testify at the earlier deposition in the civil case brought by Monfils's widow, yet he did testify there about the subject matter of his statements, Transcript (10/12/95) at 282-90, despite the fact that he could have refused to testify at all in reliance on his privilege against self-incrimination. *See LaChance v. Erickson*, 118 S. Ct. 753, 756 (1998).

Furthermore, Kutska did not limit his trial testimony to rebutting the statements the prosecution had introduced. Rather, he gave a full account of his version of events. *See*

Transcript (10/16/95) at 232 et seq. It was only at the end of his direct testimony that he addressed the assertions which had been attributed to him by a witness for the state. Transcript (10/17/95 AM) at 23. The very nature of Kutska's testimony thus suggests that the introduction of his prior statements played little if any role in his decision to testify at the criminal trial.

Moreover, all six defendants took the stand in their own defense at trial. Transcript (10/16/95) at 232 et seq.; (10/18/95) at 14 et seq.; (10/19/95 AM) at 81 et seq.; (10/19/95 PM) at 137 et seq.; (10/21/95) at 46 et seq.; (10/24/95) at 63 et seq. This unanimous decision to testify strongly implies that Kutska's reason for testifying was not unique, and that all the defendants had the same motive to get their version of the story heard.

Piaskowski's claim that he was denied his right to confrontation presents no case or controversy within the jurisdiction of this Court.

B. Kutska's Prior Statements, Which Were Against His Penal Interest, Were Sufficiently Trustworthy That They Were Admissible Against All The Other Defendants Even In The Absence Of Confrontation.

In *Williamson v. United States*, 512 U.S. 594 (1994), this Court construed the federal rule of evidence which creates a hearsay exception for statements against interest to apply only to those parts of a statement which are actually against the interest of the declarant. Under the Court's construction, Fed. Rule Evid. 804(b)(3) does not allow admission of non-self-inculpatory parts of a broader statement which is inculpatory. *See Williamson v. United States*, 512 U.S. at 599-601.

In *Williamson*, this Court found it unnecessary to address the defendant's additional claim that the statements introduced against him were also inadmissible under the Confrontation Clause. *See id.*, 512 U.S. at 605. In particular, the Court declined to decide whether the hearsay exception for declarations against penal interest was so firmly rooted as to dispense with the need for confrontation of the declarant, although it noted that "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* (citing *Lee v. Illinois*, 476 U.S. at 543-45).

There is no need for the Court to reach the unresolved constitutional issues in this case for, in addition to the fact that Piaskowski did confront and cross-examine Kutska about his prior statements at the trial, all parts of the statements which were admitted in evidence were sufficiently trustworthy to dispense with the need for confrontation.[6]

Kutska's statements were not confessions resulting from police interrogation of an arrested defendant. Rather, they were volunteered to a group of friends at a social event. Transcript (10/4/95) at 237-40. So they are not less credible than ordinary hearsay because of any motivation of the declarant to exonerate himself at the expense of another defendant. *See generally Lee v. Illinois*, 476 U.S. at 541.

Although they did not amount to an admission that he killed Monfils, Kutska's assertions that he played the tape of Monfils's police call for his union brothers, that he encouraged his brothers to give Monfils "shit," that "they" decided to confront Monfils about the tape, that "they" surrounded Monfils at Kutska's direction, that "they" started yelling and swearing at Monfils, that at least two of the group hit Monfils

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[6]Wisconsin courts have ruled that statements against interest are a firmly-rooted hearsay exception, so reliability can be inferred. *See State v. Denny*, 163 Wis. 2d 352, 358, 471 N.W.2d 606, 609 (Ct. App. 1991). The respondent agrees with this ruling, but sees no need to have it seconded by the Supreme Court.

while Kutska was present, and that Kutska did nothing to stop or even evince disapproval of either the verbal or physical attacks, Transcript (10/4/95) at 239-40; (10/5/95) at 3-20, 63, 75-76, strongly tended to subject him to criminal liability as a party to a conspiracy to commit a battery on Monfils.

One who tacitly consents to the object of a conspiracy and goes along with the other conspirators is guilty although he takes no active part in the crime but stands by while others put the conspiracy into effect. *See O'Neil v. State*, 237 Wis. at 404-05, 296 N.W. at 102.

Worse, since a party to a conspiracy may also be liable for any death which results as a natural and probable consequence of the intended offense, *see State v. Pharr*, 115 Wis. 2d 334, 349-50, 340 N.W.2d 498, 505 (1983); Wis. Stat. § 939.05(2)(c) (1997-98), Kutska's admission of participation in a conspiracy to commit a battery tended to subject him to liability for Monfils's death as a party to that naturally consequential crime. *Cf. State v. Glenn*, 199 Wis. 2d 575, 586-89, 545 N.W.2d 230, 234-36 (1996) (party to aggravated battery liable for death caused as natural consequence).

These statements had enough tendency to subject the declarant to criminal liability that a reasonable person would not have made them if they were not true, as convincingly evinced by Kutska's continuing efforts to disavow them in his own testimony. Transcript (10/17/95 AM) at 23, 44-45. The applicable reasonable person standard, *see* Judicial Council Committee's Note, 59 Wis. 2d at R318 (1973), is objective, *see Scaria v. St. Paul Fire and Marine Ins. Co.*, 68 Wis. 2d 1, 15, 227 N.W.2d 647, 655 (1975), and objectively Kutska's statements were inculpatory.

Kutska's incriminating statements could not be separated into some assertions which exclusively inculpated him and other assertions which only inculpated others.

Rather, the statements inculpating all the defendants were inexorably entwined since it was Kutska's involvement as a party to the criminal acts committed by the other defendants which incriminated him. *See Williamson v. United States*, 512 U.S. at 603. It was because the other defendants committed

criminal acts in the course of a conspiracy which led to Monfils's death that Kutska's participation in the conspiracy tended to subject him to criminal liability. *See id. See generally Pollack v. State*, 215 Wis. at 214, 253 N.W. at 566 (each conspirator criminally responsible for acts of any associates which become acts of all).

Kutska claimed that he left before the beating of Monfils was completed. But a party to a conspiracy cannot absolve himself of liability for the acts of his accomplices so easily.

> "A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward because, as the result either of fear or even of a better motive, he concludes to run away at the very instant when the act in question is about to be committed and when the transaction which immediately begets it has actually been commenced."

Pollack v. State, 215 Wis. at 212, 253 N.W. at 565. *Accord State v. Dyleski*, 154 Wis. 2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990); *Zelenka v. State*, 83 Wis. 2d 601, 621, 266 N.W.2d 279, 288 (1978).

A reasonable person in Kutska's position would have realized that any criminal acts he suggested his coconspirators committed after he claimed to have left them still inculpated him as well because he was still a member of their conspiracy. So when Kutska implied that all the other conspirators continued beating Monfils after he left, Transcript (10/5/95) at 218, he was inculpating himself as well as his companions in the continuation of the assault.

In addition to statements against penal interest, extrajudicial statements which tend to make the declarant an object of hatred, ridicule or disgrace are admissible under a different provision of the Wisconsin hearsay exception for statements against interest. *See State v. Stevens*, 171 Wis. 2d

106, 112, 490 N.W.2d 753, 756-57 (Ct. App. 1992); Wis. Stat. § 908.045(4), Rules of Evidence (1997-98).

A statement admitting responsibility for initiating a physical confrontation with an innocent man who was horribly murdered only minutes later would plainly tend to make the declarant an object of hatred or disgrace in the eyes of the community at large if it became known. And this additional reason for not making statements which were not true bolsters the reliability of Kutska's statements against his penal interest.

The reliability of Kutska's statements was further supported by the testimony of another witness recounting the statements of a different coconspirator which corroborated Kutska's account of the confrontation leading to Monfils's death. Transcript (10/13/95) at 130-31, 170, 181-83.

Piaskowski suggests that Kutska's statements were not reliable because they were made while both the declarant and the witness were drinking.

But the witness, Brian Kellner, testified that he did not have that much to drink since beer made him sick. Transcript (10/4/95) at 233-35. Kellner said that by the time Kutska started talking about the confrontation of Monfils, he had switched to drinking 7-Up. *Id.* at 237-38.

As far as the declarant, there is no evidence that Kutska was so drunk he did not know what he was saying. Rather, it appears he had reached "the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions," *State v. Guiden*, 46 Wis. 2d 328, 331, 174 N.W.2d 488, 490 (1970), so that he lost his natural reluctance to incriminate himself to his friends.

Kutska's statements against his penal interest were directly admissible against all the other defendants without violating anyone's right to confrontation because they carried particularized guarantees of trustworthiness which permitted their admission whether or not statements against interest constitute a firmly rooted hearsay exception. *See generally Lee v. Illinois*, 476 U.S. at 543.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff(s)

-vs- Case # 95 CF 00242

DALE M. BASTEN,

Defendant(s)

DECISION AND ORDER

Defendant Basten has requested this Court to grant him a new trial, setting forth several grounds in reliance thereon. The Court is also asked to reverse the conviction as it was unsupported by sufficient evidence. Several of the grounds have previously been raised, others are new at this time. After having considered the arguments of counsel and briefs filed in support of the motions, this Court must deny both motions. The reasons therefor will be set forth in the same order as they were advanced in defendant's brief.

NEWLY-DISCOVERED EVIDENCE

The oral argument and testimony presented at the motion hearing focused heavily on the recantation of Brian Kellner. It was also strenuously argued that newly-discovered evidence reveals David Wiener, another prosecution witness, gave false testimony. At trial, Brian Kellner, a co-worker of the several defendants in the consolidated cases, testified to an incident which occurred on the July 4th weekend in 1994 at the Fox Den bar. At the motion hearing on February 12 and 13, Mr. Kellner recanted a portion of his trial testimony. He now says the answers he gave in response to questions as to the identity of individuals at the "bubbler" confrontation

were not truthful. He states he gave untruthful testimony because he had been threatened by one of the investigating officers, feared that he would go to jail and lose his children if he did not testify as he did and also felt that his testimony at the time did not matter. Testimony was presented at the February motion hearing concerning the reasons for Mr. Kellner's fears, that testimony being concerned chiefly with the interrogation methods used by Sergeant Winkler of the Green Bay Police Department. The State presented testimony contradicting Mr. Kellner's present testimony. Clearly the testimony given at trial and the testimony now proffered by Mr. Kellner is at odds. The question is does it constitute such newly-discovered evidence as would justify a new trial. State v. McCallum, 198 Wis. 2d 149, 542 N.W.2d 184 (Ct.App. 1995) sets forth the guidelines for this Court to follow in making its determination.

Mr. Kellner's recantation is evidence which has come to defendant's knowledge after trial and the defendant was not negligent for failing to discover it prior to the pending motions. Indeed, it did not exist until the actual change of heart by Mr. Kellner. The questions this Court must resolve are whether the evidence is material to the issue, whether it is merely cumulative to previous testimony and whether it is reasonably probable that a different result would be reached in a new trial. It is also necessary that the recantation be corroborated by other newly-discovered evidence.

Kellner's testimony was the subject of motions prior to trial. As the defense brief mentions, the State argued during the July 9, 1995 motion hearings that Mr. Kellner's testimony was of great consequence. That underlying assumption is made throughout the defense's position at this time. It is suggested the testimony of Kellner was crucial and the testimony of David Wiener, which will be discussed later, was the most critical testimony presented.

Before addressing the issues presented, the Court should point out that the testimony of Kellner and Wiener, as presented during the trial was simply two pieces of thread in the State's tapestry.

The defendants were not convicted on the basis of the testimony of Brian Kellner and David Wiener. They were convicted on the basis of all the testimony and evidence adduced during the trial; the strongest and most damaging being the testimony of the defendants themselves. In the Court's view, when Mr. Kellner's testimony was presented at trial, it was barely credible. He recounted an instance which occurred after an all-day drinking bout. Mr. Kutska was intoxicated when the events occurred. Mr. Kellner was very close behind him in his level of intoxication. Mr. Kellner's ex-wife testified she was so drunk she had little recollection of anything that happened. The Court is satisfied that Kellner's testimony, as hyped as it may have been prior to its introduction, had little to do with the ultimate verdict rendered in these cases.

Mr. Kellner now recants his trial testimony. It is clear he has committed perjury either at the time of the trial or the February, 1997 motion hearings. At what time he was lying is immaterial. His trial testimony established, if believed then, that certain named individuals were present at a confrontation near a "bubbler". It does nothing more than that. It does not establish a crime, it does not establish any individual as participating in a crime, it simply places those individuals at a location consistent with testimony given by many other witnesses. To say his testimony was critical to the conviction vastly and greatly overestimates its importance and ignores five weeks of other testimony and evidence presented. The same is also true of Mr. Wiener's testimony.

Clearly, Kellner's present testimony that he cannot name individuals who were at the "bubbler" confrontation is

material. It relates to one of the pieces of circumstantial evidence upon which the State relied in obtaining a conviction. While it is material, that simply means that the testimony would be admitted during the trial; its weight would be something for the jury to consider.

Testimony concerning the reasons for recantation is indeed cumulative to the testimony introduced at the trial. The jury heard, at length, testimony regarding Sergeant Winkler's techniques, the methods used in obtaining Mr. Kellner's statement and the other pressures that may have been brought to bear from other sources. While testimony is now being recanted, the recantation is not with respect to the incident as a whole, but rather with respect to the question of identification of individuals. All other issues regarding interrogation techniques and tactics were more than adequately covered during the course of the trial and would not come as a surprise to any member of the jury.

A recantation would warrant a new trial only when corroborated by other newly-discovered evidence. The recantation in this case, together with the explanation of motives for the claimed original false testimony, affords sufficient corroboration. Therefore, the requirement of corroboration is satisfied. The affidavit of Verna Irish filed as corroboration really does nothing to add or detract with respect to Mr. Kellner's testimony.

The primary issue which the Court must address is whether it would be reasonably probable that a different result would be reached at a new trial based on the recantation by Mr. Kellner. The Court is of the opinion that Mr. Kellner's recantation would have no effect whatsoever on the result in the trial of these cases. The Court is satisfied that in spite of the publicity attendant upon Mr. Kellner's testimony, it had little, if any, effect upon the jury's verdict. Counsel for the defendant ably and effectively muted any damaging effect that Mr. Kellner may have had by pointing out the varying

degrees of intoxication among the individuals involved and establishing that, for the most part, a great deal of the playacting was of the "what if" variety. This Court has a great deal of difficulty in accepting that the recantation is in fact credible and indeed doubts that a reasonable jury would believe the recantation. However, even if such recantation were believable and a jury were to accept it as truthful, there is still no reasonable probability of a different result in the jury verdict. This previously-mentioned testimony of Kellner has been vastly overblown insofar as its weight and importance are concerned. While the State may at one time have thought such testimony to have been crucial to its case, that bubble was burst when Mr. Kellner took the stand at trial. His testimony was not crucial and his present recantation, or total impeachment, would have little effect on the result of this trial.

The defense contends David Wiener gave false testimony and is, in fact, the murderer. The grounds and allegation for the claim of false testimony by Mr. Wiener are based on affidavits and testimony presented by fellow prison inmates. This evidence likewise was not within the moving party's knowledge at the time of trial, nor has the moving party been negligent in not having discovered it prior to the presentation of these motions. This evidence too, insofar as it impeaches the testimony of Mr. Wiener, is material to the issue. Here, the defense is presented with a situation which involves impeachment of a witness. There is no recantation by Mr. Wiener, but there is testimony of witnesses who say Mr. Wiener made inconsistent statements after the conclusion of the trial. Mr. Wiener testified and denied such inconsistent statements were made. The use of "jailhouse testimony" is a morass into which this court hesitates to descend. However, the issue must be addressed.

Quite frankly, the testimony and affidavits submitted both in support of and in denial of defense's present contents might be described as imaginative, resourceful and innovative, but

in no event could the word "credible" be attached to them. While the impeachment of Mr. Wiener certainly would be material and not cumulative, the evidence presented for that impeachment would interject a sideshow atmosphere that would have a tendency to, or indeed result in the creation of a full three-ring circus. The suspect agendas which the various witnesses may have, together with the gratuitous information they tend to give in their testimony, would result in a total waste of time for the little probative value such evidence might have. Assuming, for purpoes of this decision, that all the testimony and evidence offered by the defense would be admissible to impeach Mr. Wiener, the end result would be to confuse and obfuscate the issues by digression to collateral matters.

If Mr. Wiener were impeached, that would effectively throw out his testimony that he saw the defendants Basten and Johnson hunched over carrying something which seemed to be heavy. That indeed is damaging evidence, but as previously mentioned is nothing more than one piece of evidence presented by the State upon which this case is built.

The entire case as presented by the State, insofar as it implicates the six defendants in direct involvement in the murder of the victim, was circumstantial and totally devoid of any eyewitness or direct testimony. Any of several pieces of evidence could have been removed without damage to the State's case and without assaulting the integrity of the jury's verdicts. Mr. Wiener's testimony fits in that category. To say a different result would follow by allowing the impeaching testimony to come in at a trial, is once again to ignore the reality of the balance of the trial and the other evidence presented.

ADMISSION OF KUTSKA'S OUT-OF-COURT STATEMENTS AS ERROR

This issue was previously addressed in motions prior to trial, at which time the Court allowed such statements to be admitted. As a matter of fact, once Mr. Kutska testified during the trial, those statements were then no longer hearsay within the statutory definition.

The statements made by the defendant Kutska, in the Court's view, are against his interest in that they are statements which would tend to subject him to ridicule or disgrace. One must bear in mind the background in which such statements were made. Mr. Kutska was in effect saying that he instigated a confrontation against an individual who was later found murdered. While those statements do not implicate him in the murder, they certainly portray him as an arrogant bully, enjoying the discomfort to which he subjected another person. Contrary to the assertions of inculpation or exculpation, those statements do not involve anyone in a murder. They do not implicate anyone in the crime charged.

The Court is satisfied the State could not have compelled any testimony by Mr. Kutska, as he was a named defendant with pending criminal charges. Therefore, although he may have been available as a witness for any of the defense counsel until such time as he actually claimed his Fifth Amendment privilege, he was not available to the State, and therefore, the State's position in this case is different than that of a co-defendant wishing to offer a statement against interest by another party.

. . . .

REVERSAL OF CONVICTION BECAUSE UNSUPPORTED BY EVIDENCE

As mentioned, the briefs submitted at this time focus on certain testimony deemed by defendant as prejudicial, that of Kellner and Wiener. Counsel for defendants have ably, vigorously and correctly argued that a conviction cannot be sustained on the basis of such evidence. If indeed that was the only evidence in this case, the Court would never have allowed this case to go to the jury. Overlooked is the fact that a great deal of testimony was presented during a period of five weeks including, most importantly, testimony of each of the defendants.

The evidentiary portion of the consolidated trial took a total of five weeks. During that time the State presented numerous witnesses and exhibits, a view of the crime scene was had and the jurors were allowed to take notes during the course of the testimony. From the Court's observations, the jury was observant, interested and alert. The State presented testimony and evidence setting forth time lines and locations for the defendants and various other individuals working in the paper mill. Testimony and evidence clearly established, without any question, that Mr. Monfils had been the victim of a physical assault and that his death occurred when he was thrown into the pulp vat. His death was not a suicide nor an accident. Having laid that groundwork, the State then presented evidence to show, as best it could, when the attack occurred and who was in the immediate area who could have either participated in or observed the events. At the conclusion of the State's case, there was more than adequate credible evidence which would have allowed the jury to find all defendants guilty.

Each of the defendants testified on their own behalf. The testimony of the defendants was such that the State's case was buttressed and supported with each passing day. The jury had the opportunity to listen to the witnesses and

observe their demeanor. As defense counsel argue at this time, certainly one cannot be convicted on the basis of demeanor. No one was. The observation of demeanor is simply a device by which the jury is assisted in establishing or assessing the credibility of a particular witness. Considering the testimony of the defendants together with the facts which had been established by the State, the jury could, and undoubtedly did, conclude that the defendants' testimony was not entirely truthful. Considering the evidence as a whole, there is no question that there was sufficient, competent evidence upon which the jury could return the verdict of guilty with respect to each defendant. When the defendants testified, the jury had the choice of believing or disbelieving their testimony. That is peculiarly the function of the jury and there is an adequate, logical basis for their decision in this case.

ORDER

Now therefore, for the reasons set forth above;

IT IS ORDERED:

THAT THE DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED;

THAT THE DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IS DENIED.

Dated at Appleton, Wisconsin this 24th day of February, 1997.

BY THE COURT:

/s/ _____
JAMES T. BAYORGEON
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff(s)

-vs- Case # 95 CF 00239

MICHAEL L. PIASKOWSKI,

Defendant(s)

DECISION AND ORDER

The defendant, Michael Piaskowski, has filed postconviction motions seeking to have the Judgment of Conviction vacated or, in the alternative, a new trial. Those motions were heard on May 8, 1997.

Prior to the commencement of the motion hearing, counsel for Mr. Piaskowski served a Subpoena Duces Tecum on the Green Bay Chief of Police. That subpoena required the Chief to attend the motion hearing and bring with him the following documents: (1) complaints or concerns about Randy Winkler's investigation of the Monfils murder; (2) any investigation undertaken by or on behalf of the Green Bay Police Department regarding any aspect of Randy Winkler's conduct of the Monfils murder investigation; (3) all absences from work (including, but not limited to, leaves of absence, whether voluntary or involuntary) by Randy Winkler since the conclusion of the Monfils trial; (4) disciplinary action taken or considered against Randy Winkler as a result of his conduct of the Monfils murder investigation.

. . . .

Much has been made in previous motions concerning David Weiner and the alleged favorable treatment he received from the State in exchange for his testimony. It is clear that many of the individuals who discussed Mr. Weiner are totally unacquainted with any of the facts surrounding his conviction. As an example, inmate Marcum indicates David Weiner told him that he was charged at first, but the charges were dropped for his testimony. There is no factual basis for that statement. There was never any reduction of charges against Mr. Weiner. He was found guilty of a lesser included offense and given a substantial sentence. The modification of his sentence occurred after his testimony in the Monfils trial and there is absolutely no evidence, nor any evidence from which an inference can be drawn, that there was any promise or deal made with Mr. Weiner in return for his testimony. The other grounds set forth regarding the exclusion of the nature of David Weiner's conviction, the hearsay statements of Kutska, the severance motion and the expert testimony ruling have previously been addressed by the Court.

As this Court has previously remarked, the Jury returned verdicts of guilty after a lengthy, concentrated trial. This Court is satisfied that the verdicts were based upon all the testimony and evidence heard during the course of the trial including, most importantly, the testimony of the defendants themselves. That there were contradictions and inconsistencies in some of the testimony is to be expected. The Jury was entitled to and did, in this Court's opinion, disregard evidence that they felt had no credibility. They engaged in serious deliberations, considered all the relevant evidence and arrived at their verdict. At this time, to impeach those verdicts based upon speculation and surmise by individuals who have no knowledge of the facts is totally inappropriate.

As indicated above, this court has previously heard, considered and ruled on motions filed in companion cases.

Specifically, motions have been heard and decisions filed in State of Wisconsin -vs- Reynold C. Moore, 95CF240; State of Wisconsin -vs- Dale M. Basten, 95CF242; State of Wisconsin -vs- Michael L. Johnson, 95CF243. Other than the issue raised by defense in this case concerning the personnel records, all arguments made at this time have previously been advanced and argued in the other cases. Counsel has incorporated the evidence, testimony and arguments presented in those cases into his motion in the instant case. Accordingly, this Court will incorporate by reference in this decision the decisions previously issued in the companion cases.

ORDER

Now therefore, for the reasons set forth above;

IT IS ORDERED:

THAT THE DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED;

THAT THE DEFENDANT'S MOTION TO VACATE HIS CONVICTION AND SENTENCE IS DENIED.

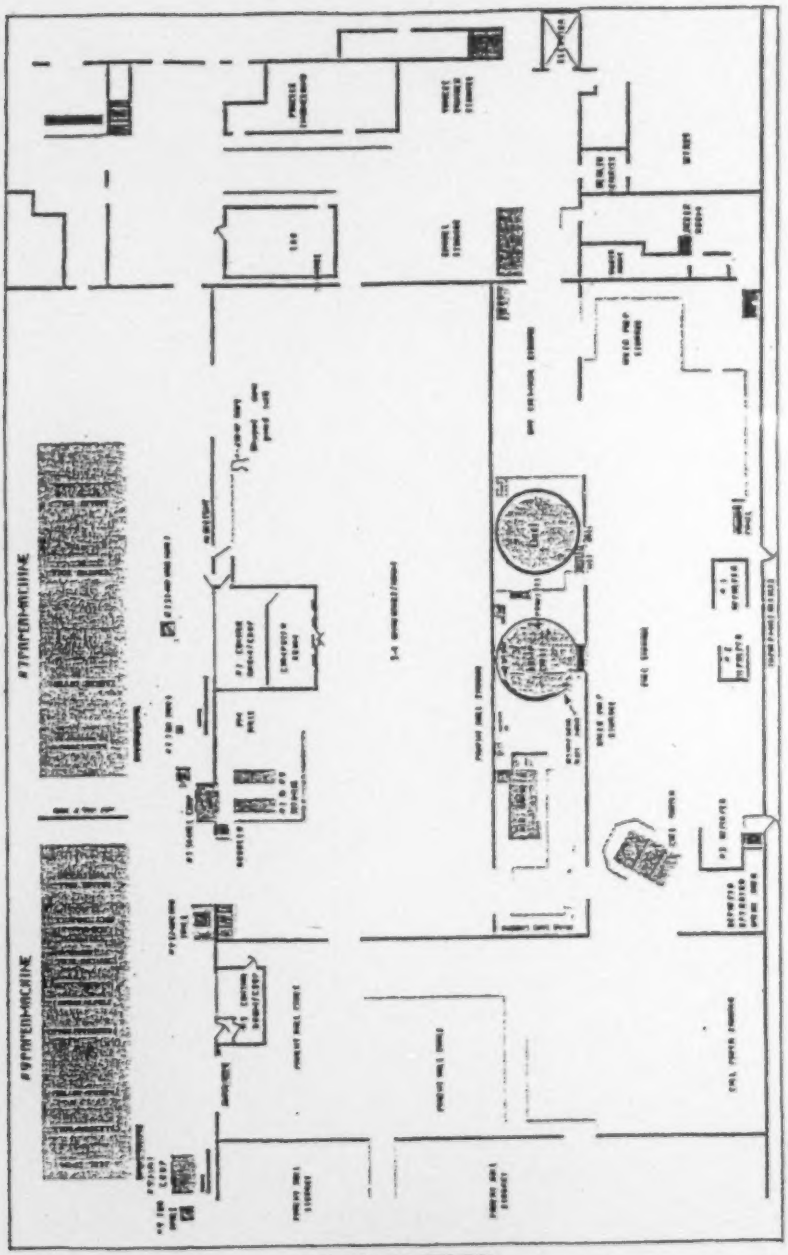
THAT THE PERSONNEL RECORDS FURNISHED PURSUANT TO THE SUBPOENA DUCES TECUM SHALL BE PLACED IN THE FILE UNDER SEAL TO BE OPENED ONLY FOR PURPOSES OF APPELLATE REVIEW OR BY FURTHER ORDER OF THIS COURT.

Dated at Appleton, Wisconsin this 30th day of May, 1997.

BY THE COURT:

/s/ _____
JAMES T. BAYORGEON
Circuit Court Judge

JAMES RIVER PAPER MILL
THOMAS MONFILS HOMICIDE 11-21-92



EXHIBIT
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